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In The

Supreme Court of The United States

October Term, 1956

JOHN FEDERIKA and CATHERINE FEDERIKA, his wife, MAX FOGEL and HELEN FOGEL, his wife, ROBERT FOGEL and SYLVIA FOGEL, his wife,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and regulations involved	2
Statement –	
A. The Basic Facts	2
B. The Decision of the Court of Appeals	3
Reasons for granting the writ –	
1. The Decision below is in real, direct and embarrassing conflict with a Decision of the Ninth Circuit Court of Appeals and also is in conflict with decisions of the First and Fifth Circuit Courts of Appeals and of The Tax Court of the United States.	4
2. The Decision of the court below is in conflict with applicable decisions of this Court.	7
Conclusion	9
Appendix A – Statutes and Regulations involved	10-11

AUTHORITIES

CASES

Comm. v. Heininger, 320 U.S. 467 6
Continental Oil Co. v. Jones, 10 Cir., 177 F 2d 508, cert. den. 339 U.S. 931 8
Eisner v. Macomber, 252 U.S. 189 8
Gasper v. Commissioner, 6 Cir. 225 F. 2d, 284, 287 5, 7
Helvering v. Taylor, 293 U.S. 507 7
Humphrey v. Comm., 5 Cir., 1947, 162 Fd. 2d, 853, cert. den. 1947, 332 U.S. 817 5
Interlocken Co., Inc. v. Comm. 232 F 2d 873, 877.. 8
Merchants Loan & Trust Co. v. Smietanka, 255 U.S. 509 8
Showell v. Commissioner of Internal Revenue 4
Wichita Coca Cola Bottling Co. v. U.S. 5 Cir., 152 F F 2d 6 8
Winkler v. U.S., 230 F 2d, 766 (CA 1st, March 8, 1956) 5, 6

FEDERAL STATUTES

28 U.S.C.A., Sec. 1254 (1) and Section 7482 (a) of the Internal Revenue Code 2
Section 54 of the 1939 Internal Revenue Code 5
Section 23 (h) of 1939 Code 5, 6
Section 23 (e) 5
Section 22 of 1939 Code 6

MISCELLANEOUS

T.C. Memo 1955-172 1
T.C. Memo 1955-186 1
T.C. Memo 1955-185 1
Rule 21 (4) 1
Jack Showell, 23 T.C. 495 (on appeal to U.S.C.C.A. 9) 4, 5, 7
G. A. Comeaux, 10 T.C. 201, aff. 176 F. 2d 586 (CA 10, 1949) 6
James P. Mc Kenna, 1 B.T.A. 326 ..... 6, 7, 8

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. ————

JOHN FEDERIKA and CATHERINE FEDERIKA, his wife, MAX FOGEL and HELEN FOGEL, his wife, ROBERT FOGEL and SYLVIA FOGEL, his wife,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

John Federika and wife, Max Fogel and wife, and Robert Fogel and wife, your petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled cases on October 17th, 1956.

OPINIONS BELOW

The opinions of the Tax Court are reported as T. C. Memo 1955-172, T. C. Memo 1955-186 and T. C. Memo 1955-185, nine additional copies of the record as printed for the use of the Court of Appeals have been filed pursuant to Rule 21(4). A petition for rehearing was denied

on November 13, 1956. The opinion of the Court of Appeals is reported at —— F 2d ——.

JURISDICTION

The judgment of the Court of Appeals was entered on October 17, 1956. A petition for rehearing was denied on November 13, 1956. The jursdiction of this Court is invoked under the provisions of 28 U.S.C.A., sec. 1254 (1) and section 7482 (a) of the Internal Revenue Code.

QUESTIONS PRESENTED

1. Whether an unparticularized and unexplained approximation of wagering losses was lawfully made under the Code, Regulations and judicial decisions applicable to these cases?

STATUTES AND REGULATIONS

The statutes and regulations involved are set out in Appendix A, infra, pp 10 and 11.

STATEMENT

A. The Basic Facts

The basic facts are the same in the appeals of all petitioners. The husbands in each case were involved in several business enterprises which consisted of either bookmaking, that is accepting bets on horse races or betting, that is placing bets for their own accounts with other bookmakers on horse races. The Fogel cases were tried on the same record and the Federika case was tried sep-

arately. The opinion and findings of the Tax Court in all three cases were uniform in that the Court accepted the books and records of the petitioners for most of the years, but refused to accept them for one or more years and for those years accepted the determination of the respondent in which he applied a formula (not founded on any reason, sense or logic) where he arbitrarily disallowed losses occurring on days which resulted in a net loss but accepted the same records where on any day a net win was reported. In one instance, without reason, logic or sense, the Court in its findings disallowed losses on a particular day of the week. No claim was made by the respondent that his disallowances were based either on his experience, peculiar knowledge or facts, but was merely a formula adopted arbitrarily. In some instances the Tax Court disapproved and in other years approved the respondent's disallowance of all losses in the bookmaking business which exceeded 86% of the total amount of bets taken. The only reason mentioned in one or more of the cases for this formula was the fact that in the operation of race tracks the race track withholds 14% and distributes the remaining 86% among the winning bettors. The evidence clearly showed that the petitioners herein were not operating race tracks but were bookmakers having no such rule where they took out 14%. The Court of Appeals affirmed on the opinion of the Tax Court and adopted it as its opinion.

B. The Decision of the Court of Appeals

B. The decision of the Court of Appeals has nothing to sustain it. Everything that can be said about the opinion of the Tax Court naturally applies with equal force to the adoption of said opinion by the Court of Appeals.

Its deficiencies are better pointed out in the decision in *Showell* v. *Commissioner of Internal Revenue* which was followed by the Tax Court as authority for its decisions herein but on review was reversed by the Court of Appeals Ninth Circuit, — F. 2d —.

REASONS FOR GRANTING THE WRIT

1. The decision below is in real, direct and embarrassing conflict with a decision of the Ninth Circuit Court of Appeals and also is in conflict with decisions of the First and Fifth Circuit Courts of Appeal and of the Tax Court of the United States.

a. The cause, in these cases, was argued to the Sixth Circuit Court of Appeals on October 10th, 1956 and, on October 17th, 1956, orders were entered in each case,

> "that the decision herein reviewed be and is hereby affirmed upon the opinion of the Tax Court".

Therefore, in each case, the opinion of the Tax Court specifically was adopted as the opinion of the Sixth Circuit Court of Appeals. Each case had been tried in the Tax Court before the same Division of the Tax Court and in each case the opinion of the trial judge had specifically followed a decision of the full Tax Court in the case of *Jack Showell*, 23 TC 495 (on appeal to U.S.C.C.A. 9) and had applied the same findings of fact and conclusions of law as therein.

On the day that these cases were argued to the Sixth Circuit Court of Appeals (October 10th, 1956) the decision of the Ninth Circuit United States Court of Appeals reversing the decision of the Tax Court in the *Jack Showell* case was announced and is now reported in — F (2d) —.

On November 13th, 1956 the Sixth Circuit denied petitions for rehearing herein.

All of the contentions of the petitioners herein were involved in the *Showell* case and have been ruled in favor of the petitioner by the Ninth Circuit Court of Appeals.

In the opinion of Judge Pope in the *Showell* case, which concurred with the majority opinion, the rendition of a final judgment was urged on the cited basis of a Sixth Circuit opinion in *Gasper* v. *Commissioner,* 6 Cir. 225 F. 2d 284, 287.

b. The meaning of "gross income" is vital in these cases. The Commissioner of Internal Revenue had refused to allow any net daily losses recorded in the permanent personal and partnership ledgers maintained for the alleged reason that such entries were not sufficient to establish gross income and to reflect the taxable income clearly but had accepted the figures of net daily gains reflected in the same records.

The Tax Court "bore heavily" against the petitioners for their failure to maintain adequate records, contending that the reference of Section 54 of the 1939 Internal Revenue Code to gross income meant that petitioners were required to establish the respective amounts of gross receipts, gross winnings and gross losses.

The Tax Court commented, "The petitioner has the burden of proving that the losses claimed were in fact sustained" and, "bearing heavily" against petitioners, proceeded to determine the amount of allowable losses by conjectural approximation.

In *Winkler* v. *U. S.*, 230 F 2d 766 (CA 1st, March 8, 1956) the First Circuit held that the effect of Section 23 (h) of the 1939 Code upon Section 23 (e) thereof was determined in *Humphrey* v. *Comm.*, 5 Cir. 1947, 162 F 2d 853, cert. den. 1947, 332 U.S. 817. In other words

23 (h) was not just an additional restriction upon 23 (e) but was in substitution therefore so far as wagering transactions are concerned.

The First Circuit therefore decided in the *Winkler* case that there was no gain at all within the meaning of Section 22 of the 1939 Code unless winnings in a particular race exceed losses in that same race.

> *The disallowance of any amount of losses on losing days deprives a taxpayer of the benefit of Section 23 (h) of the 1939 Code and includes in "gross income" loss deductions specifically permitted by the Code.* (emphasis by petitioners)

No Statute, regulation or judicial decision required the keeping of records separating gains from losses in wagering transactions prior to 1951 and the separate reporting of total gains, from which total or partial losses might be deducted only if substantiated in an unspecified manner, out of harmony with the specific statutory provision permitting the deduction of losses from gains to the full extent of gains.

Both the Tax Court in *G. A. Comeaux,* 10 TC 201, aff. 176 F 2d 586 (CA 10, 1949) and the Supreme Court of the United States in *Comm.* v. *Heininger,* 320 U.S. 467, have held that the income tax is not a tax on gross income even if the income be earned in an illegal business.

c. In the *James P. McKenna* case, 1 BTA 326, it was firmly established that the wagering business, upon horses, has no gains until the losses are deducted therefrom and that it is only the net gain that is taxable; that net income is gross income only in the event that there are no statutory deductions to be considered; and, that

> *the actual gains to taxpayers constitute "gross income" within the meaning of the Code.* (emphasis by petitioners)

In the opinion of the Tax Court, which was adopted as the opinion of the Sixth Circuit herein, the rule of the *McKenna* case was abandoned but, on March 8, 1956, in the *Winkler* case, the First Circuit United States Court of Appeals affirmed the "*McKenna Rule*" to be the properly applicable rule of law and that all other payments than net loss over a yearly operation are treated as offsetting gains prior to the determination of gross income.

Even in the now reversed *Jack Showell* case a dissenting opinion was written by Judge Withey of the Tax Court, in which Judge Bruce concurred, to the effect:

> "I am of the opinion that if the record justifies the allowance of any losses in excess of those allowed by the respondent, it justifies the allowance of the full amount of losses contended by the petitioners."

2. The decision of the Court below is in conflict with applicable decisions of this Court.

In *Helvering* v. *Taylor*, 293 U.S. 507, the fact that the Commissioner of Internal Revenue's determination of a deficiency was arbitrarily made may reasonably be deemed sufficient to require that it be set aside was affirmed by this Court. The Sixth Circuit followed this Court in *Gasper* v. *Commissioner*, 225 F 2d 284 (CA 6) but has now adopted the Tax Court's departure from the principle herein.

The Tax Court, however, did determine here that the action of the Commissioner was wrong and, therefore, no part of the arbitrary determination of the Commissioner should have given rise to any presumption of correctness.

> *It was the duty of the Tax Court to find the facts for itself but its approximation of allowable losses not only is inconsistent with the other findings of fact but also is clearly erroneous because it is based upon*

> *no showing whatever which would warrant a rejection of the proof of the losses disclosed by permanent records.* (emphasis by petitioners)

Under the circumstances disclosed by the Tax Court's findings of fact and opinion there was not even a burden upon the taxpayers to show what the correct amount of a possible deficiency should have been.

The Tax Court found that records kept for previous years were similar to the records kept for the taxable years involved; that the returns and records kept for earlier years had been examined by the Commissioner's agents in the regular scope of their employment and that they did not advise the petitioners wins and losses should be separated or that records kept were otherwise inadequate.

Judge Korner, in *James P. McKenna,* 1 BTA 326, had cited the decisions of this Court in *Eisner* v. *Macomber,* 252 U.S. 189 and *Merchants Loan and Trust Co.* v. *Smietanka,* 255 U.S. 509 as to the definition of "income" and the doctrine of estoppel also is a valid doctrine of law.

Fully accredited agents of the Commissioner, acting within the apparent and actual scope of their authority, were familiar with the methods of accounting employed by petitioners, had accepted the method and had approved its results.

Nevertheless, it should not be necessary to enter into a discussion of estoppel for there is a plain duty of consistency which has been accepted without regard to whether there is a technical estoppel. See *Continental Oil Co.* v. *Jones,* 10 Cir., 177 F 2d 508, cert. den. 339 U.S. 931; *Interlocken Company Inc. v. Comm.* 232 F 2d 873, 877; *Wichita Coca Cola Bottling Co.,* v. *U. S.,* 5 Cir. 152 F 2d 6.

> *The court below has decided federal questions of law in conflict with the applicable decisions of this Court and has departed so far from the accepted and usual*

course of judicial proceedings as to call for an exercise of this Court's power of supervision. (emphasis by petitioners)

CONCLUSION

It is thus evident that the decision of the Court of Appeals is in conflict with the decision of the Ninth Circuit Court of Appeals, also with the First Circuit Court of Appeals and the Fifth Circuit Court of Appeals. It is also contrary to previous decisions of this Court.

A question of taxation being left in such a situation should be resolved by this Court. In the cases here presented the amounts assessed against petitioners by the Commissioner were phenomenal and entirely unobtainable. The amounts as reduced by the Tax Court and affirmed by the Court of Appeals are just as wrong in that it will still take away every penny that the petitioners have saved during their entire lifetime and still leave the major portion of the assessment unsatisfied.

Petitioners pray the Court that this petition for a writ of certiorari be granted and that upon a hearing that the decision of the Court of Appeals be reversed.

Respectfully submitted,

JOHN W. DRISCOLL
SOL GOODMAN
Attorneys for Petitioners

OF COUNSEL:
STANLEY GOODMAN

Dec., 1956.

APPENDIX A

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(h) *Wagering Losses.*—Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions.

* * * * *

(26 U. S. C. 1952 ed., Sec. 23.)

SEC. 54. RECORDS AND SPECIAL RETURNS.

(a) *By Taxpayer.*—Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

* * * * *

(26 U. S. C. 1952 ed., Sec. 54.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.54-1 [As amended by T. D. 5381, 1944 Cum. Bul. 188, 189]. *Records and Income Tax Forms.*—Every person subject to the tax, except persons whose gross income (1) consists solely of salary, wages, or similar compensation for personal services rendered, or (2) arises solely from the business of growing and selling products of the soil, shall, for the purpose of enabling the Com-

missioner to determine the correct amount of income subject to the tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits and other matters required to be shown in any return under chapter 1. Every organization exempt from tax under section 101 but required by section 54 (f) to file an annual return shall keep such permanent books of account or records, including inventories, as are sufficient to show specifically the items of gross income, receipts, and disbursements, and such other information as is required by section 29.101-2. The books or records required by this section shall be kept at all times available for inspection by internal-revenue officers, and shall be retained so long as the contents thereof may become material in the administration of any internal-revenue law.

Income-tax forms shall be prescribed by the Commissioner and shall be executed and filed in accordance with these regulations and the instructions on the form or issued therewith.

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PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 12,755

CAUSE ARGUED AND SUBMITTED

(Oct. 10, 1956—Before: McAllister, Miller and Stewart, JJ.)

This cause is argued by John Driskill for petitioners and by Davis W. Morton, Jr., for respondent and is submitted to the court.

JUDGMENT

(Filed: Oct. 17, 1956)

The above cause coming on to be heard upon the transcript of the record, the briefs of the parties, and the argument of counsel, and the court being duly advised,

Now, Therefore, It is ordered, adjudged and decreed that the decision herein reviewed be and is hereby affirmed upon the opinion of the Tax Court.

PETITION FOR REHEARING

(Filed Oct. 26, 1956)

ORDER DENYING REHEARING

(Filed: Nov. 13, 1956)

The petition for rehearing is denied.

CERTIFICATE OF THE CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 12,756

CAUSE ARGUED AND SUBMITTED

(Oct. 10, 1956—Before: McAllister, Miller and Stewart, JJ.)

This cause is argued by John Driskill for petitioners and by S. Dee Hanson for Respondent and is submitted to the court.

JUDGMENT

(Filed: Oct. 17, 1956)

The above cause coming on to be heard upon the transcript of the record, the briefs of the parties, and the argument of counsel, and the court being duly advised,

Now, Therefore, It is ordered, adjudged and decreed that the decision herein reviewed be and is hereby affirmed upon the opinion of the Tax Court.

PETITION FOR REHEARING

(Filed Oct. 26, 1956)

ORDER DENYING REHEARING

(Filed: Nov. 13, 1956)

The petition for rehearing is denied.

CERTIFICATE OF THE CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 12,764

CAUSE ARGUED AND SUBMITTED

(Oct. 10, 1956—Before: McAllister, Miller and Stewart, JJ.)

This cause is argued by Sol Goodman for petitioners and by S. Dee Hanson for respondent and is submitted to the court.

JUDGMENT

(Filed: Oct. 17, 1956)

The above cause coming on to be heard upon the transcript of the record, the briefs of the parties, and the argument of counsel, and the court being duly advised,

Now, Therefore, It is ordered, adjudged and decreed that the decision herein reviewed be and is hereby affirmed upon the opinion of the Tax Court.

PETITION FOR REHEARING

(Filed Oct. 31, 1956)

ORDER DENYING REHEARING

(Filed: Nov. 21, 1956)

The petition for rehearing is denied.

CERTIFICATE OF THE CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes and Regulations involved	2
Statement	3
Argument	7
Conclusion	11

CITATIONS

Cases:	
Boehm v. *Commissioner*, 326 U. S. 287	7
Burnet v. *Houston*, 283 U. S. 223	7
Cohan v. *Commissioner*, 39 F. 2d 540	7
Comstock v. *Group of Institutional Investors*, 335 U. S. 211	9
Helvering v. *Safe Deposit Co.*, 316 U. S. 56	7, 8
Helvering v. *Taylor*, 293 U. S. 507	10
Humphrey v. *Commissioner*, 162 F. 2d 853, certiorari denied, 332 U. S. 817	10
Interstate Transit Lines v. *Commissioner*, 319 U. S. 590	7
Nellis v. *Commissioner*, 232 F. 2d 890	9
Showell v. *Commissioner*, 238 F. 2d 148	9
Winkler v. *United States*, 230 F. 2d 766	10
Statutes:	
Internal Revenue Code of 1939:	
Sec. 23 (h) (26 U. S. C. 23 (h))	2
Sec. 54 (a) (26 U. S. C. 54 (a))	2, 8
Miscellaneous:	
Treasury Regulations 111, Sec. 29.54–1	3, 8

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 687

JOHN FEDERIKA AND CATHERINE FEDERIKA, HIS WIFE, MAX FOGEL AND HELEN FOGEL, HIS WIFE, ROBERT FOGEL AND SYLVIA FOGEL, HIS WIFE, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 10a–24a)[1] are not officially reported. The Court of Appeals affirmed on the opinion of the Tax Court (Pet. 12).

[1] Unless otherwise noted, record references are made to the Appendix to the taxpayers' brief in the Court of Appeals in the *Federika* case only, since the issues and findings in the *Fogel* cases are substantially the same. And unless otherwise indicated the term "taxpayer" has reference to Mr. Federika, since the wives are parties only because joint returns were filed for some of the taxable years.

JURISDICTION

The judgments of the Court of Appeals were entered on October 17, 1956. (Pet. 12–14.) The taxpayers' petitions for rehearing were denied on November 13 and 21, 1956. (Pet. 12–14.) The petition for a writ of certiorari was filed on January 10, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether the Tax Court properly disallowed, for lack of proof, part of the deductions claimed by taxpayers for losses from gambling transactions, where taxpayers had destroyed the original records of their operations and sought to substantiate the deductions by uncorroborated testimony which the Tax Court did not believe.

STATUTES AND REGULATIONS INVOLVED

The following portions of the Internal Revenue Code of 1939 and Treasury Regulations 111 are pertinent:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (h) *Wagering Losses.*—Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions.
>
> * * * * *
>
> (26 U. S. C. 23.)
>
> SEC. 54. RECORDS AND SPECIAL RETURNS.
>
> (a) *By Taxpayer.*—Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records,

render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

* * * * *

(26 U. S. C. 54.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.54–1 [as amended by T. C. 5381, 1944 Cum. Bull. 188] *Records and Income Tax Forms.*—Every person subject to the tax, except persons whose gross income (1) consists solely of salary, wages, or similar compensation for personal services rendered, or (2) arises solely from the business of growing and selling products of the soil, shall, for the purpose of enabling the Commissioner to determine the correct amount of income subject to the tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown in any return under chapter 1. * * * The books or records required by this section shall be kept at all times available for inspection by internal-revenue officers, and shall be retained so long as the contents thereof may become material in the administration of any internal-revenue law.

STATEMENT

The facts, as found by the Tax Court (R. 10a–21a), and as adopted by the Court of Appeals, may be summarized as follows:

The taxpayer has been a bookmaker since 1933 in Ohio, although the acceptance of bets on horse races through the operation of handbooks is illegal in that state. During the taxable years in question (1947–1950) the taxpayer maintained an office in Norwood, Ohio. On business days several of his representatives at locations in the surrounding area would accept wagers and call them in to his office by telephone. (R. 11a.)

With one exception, the taxpayer's understanding with his agents was that the taxpayer and they were to divide evenly the profit from the wagering, less the cost of newspapers and racing forms, cost of telephone service and rent paid by the taxpayer to the owner of the premises where bets were accepted. (R. 11a.)

The bets called in by the various agents were recorded by clerks in the taxpayer's office. This was done on a 58-line sheet each day for each location from which a clerk was taking phone calls. The following recordings were made on these sheets: name of horse, the amount and nature of the bet, whether it won or lost, and a number or letter identifying the bettor. At the end of the day a clerk would determine the profit or loss from the operation. Thereafter, the sheets were given to the taxpayer who made entries from them into his permanent records. The detailed sheets were destroyed by the taxpayer because he feared that they could be used as evidence in proceedings against him growing out of his bookmaking activities. (R. 12a–14a.)

The taxpayer's permanent records, the only records available, contained only a single net win or loss figure which purportedly represented a summary of the net results of the betting operations, without giving any details, such as horses bet on, amounts wagered, amounts paid out, or names of bettors. A number of days were listed as net loss days as to which no winnings were recorded. (R. 14a–16a.)[2]

During the taxable years, the taxpayer also wagered on horse races on his own account and in each of the years sustained a net loss from these personal wagers. The detailed records on these transactions were not destroyed. (R. 16a.)

During 1949, the taxpayer had an interest in a partnership known as K. F. & P. Enterprise. This partnership was engaged in the business of accepting wagers on horses and was located at the taxpayer's office. There was no evidence indicating the details of the partnership's activities, the profits or losses from its operations during the time the taxpayer was

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[2] In the *Fogel* cases the taxpayers carried on their bookmaking activities through four partnerships, three of which engaged in the making of wagers on horse races, while the fourth accepted bets which it placed with others. The income reported by each partnership was computed by accountants on the basis of certain summary records furnished by the partners, detailed records having been destroyed. The accountants had no personal knowledge of the accuracy or reliability of the figures contained in the records given them. As in the *Federika* case, the detailed betting sheets having been destroyed, the taxpayers relied on oral testimony to establish the reliability of the net loss entries in the retained summary records. (Appendix to the taxpayer's brief in the *Fogel* case in the Court of Appeals, number 12756, pp. 12a–13a, 14a, 19a.)

a partner, or the reasons for certain payments taxpayer claims he made to it. (R. 16a, 18a–19a, 23a.)

The taxpayer prepared his own returns for the taxable years. He listed his occupation as "Sports Commissioner." On each return he reported only one figure for his bookmaking and wagering activities for the year. This figure allegedly was the net profits from his bookmaking activities. In computing the amount reported for 1949, he also included a loss of $1,895.07 from the operations of K. F. & P. Enterprise. (R. 16a.)

The Commissioner of Internal Revenue in his computation disallowed losses from handbook operations on the days listed as net loss days for lack of substantiation and disallowed the loss claimed from the partnership operations for the same reason. The Commissioner allowed as deductions, losses from the personal wagering transactions which were substantiated by the records not destroyed, amounts of business expenses claimed as deductions from "net commissions" or gross receipts, and losses sustained on days when net wins were recorded and on days when losses were equal to winnings. (R. 19a–22a.) [3]

The Tax Court found that the taxpayer had failed to prove that he sustained losses in the amounts claimed. It refused to believe the taxpayer's uncor-

[3] In the *Fogel* cases the Commissioner allowed as deductions expenses and losses on net win days and days when wins equaled losses, but denied losses on net loss days for lack of substantiation. He also limited deductions for payments in the bookmaking operation to 86 percent of the amounts wagered. (See Appendix to the taxpayer's brief in the *Fogel* case in the Court of Appeals, number 12756, p. 30a, 33a.)

roborated testimony that the summary daily net loss figures recorded by him reflected actual amounts of daily net losses sustained in his bookmaking operations. However, it found from the entire record that the taxpayer did experience some days on which losses exceeded winnings, and allowed a reasonable addition to the losses allowed by the Commissioner. (R. 22a.) The Court of Appeals affirmed upon the opinion of the Tax Court. (Pet. 12–14.)

ARGUMENT

1. The Commissioner of Internal Revenue and the courts were here faced with the situation of taxpayers, engaged in gambling enterprises, who, for reasons sufficient to themselves, found it undesirable to retain records itemizing payments claimed to be deductible in the computation of their taxable income. In the place of these records the taxpayers offered oral testimony that they suffered the gambling losses which were reflected in the summary totals which were the only records they did retain. The Commissioner disallowed part of those deductions and the Tax Court, disbelieving the taxpayers' testimony, also reduced the totals of the deductions claimed (R. 22a). Now, the taxpayers complain that the action of accepting the figures on receipts and part of the figures on losses, while rejecting a part of the figures on payments, is arbitrary and unreasonable (Pet. 3–4).

In the first place it is clear that the burden of proof was on the taxpayers to prove the existence of losses if they were to be allowed to take advantage of the privilege of making the deductions. *Boehm* v. *Com-*

missioner of Internal Revenue, 326 U. S. 287, 294; *Interstate Transit Lines* v. *Commissioner of Internal* Revenue, 319 U. S. 590, 593. If, under the circumstances, taxpayers had been unable to provide satisfactory proof of any losses at all, the deductions would have had to be denied entirely. *Burnet* v. *Houston,* 283 U. S. 223. While it may be that the very nature of the taxpayers' enterprises made them reluctant to retain the original detailed records of their operations,[4] that circumstance cannot shift the burden of proof from the taxpayers.

Since it was not in dispute that the taxpayers suffered some losses, it was incumbent on the Commissioner and the Tax Court to reach the best estimate they could as to the extent of the deductible losses on the basis of the facts available. *Cohan* v. *Commissioner of Internal Revenue,* 39 F. 2d 540 (C. A. 2). It does not destroy the validity of that judgment that the figures accepted as a deduction were estimates only and concededly could not be expected to do more than approximate the actual payments. *Helvering* v. *Safe Deposit Co.,* 316 U. S. 56.

[4] Taxpayer was required, under Section 54 (a) of the Internal Revenue Code of 1939, and Section 29.54–1 of Treasury Regulations 111, *supra,* pp. 2–3, to "keep such permanent books of account or records * * * as are sufficient to establish the amount of the gross income and the deductions, credits and other matters required to be shown in any return under chapter 1." He was further required to keep these books and records "at all time available for inspection by internal-revenue officers" and to retain them "so long as the contents thereof may become material in the administration of any internal-revenue law." This the taxpayer failed to do; instead, he destroyed his original, detailed records to avoid prosecution for his illegal gambling activities. (R. 12a–14a.)

In summary, therefore, the Tax Court made its findings as to the total of the deductions for losses which the record before it would sustain and the court below affirmed those findings. Such concurrent findings are not ordinarily reviewed by this Court. *Comstock* v. *Group of Institutional Investors,* 335 U. S. 211, 214.

2. There is no merit in taxpayer's assertion that the decision below is in conflict with other decisions. Whether a taxpayer has sustained the burden of proving the amount of a claimed loss deduction presents a question of fact, and in each case its determination necessarily turns on the sufficiency of the evidence proffered in support of the claimed deduction. In *Showell* v. *Commissioner,* 238 F. 2d 148 (C. A. 9th), upon which taxpayer chiefly relies (Pet. 4–5), the Court of Appeals applied the same basic principles governing the taxpayer's burden of proof and the finality of the Tax Court's factual determinations as were here applied by the court below; it remanded the case for further proceedings only because the Tax Court, in refusing to accept the taxpayer's claimed losses, did not base its action on disbelief in his testimony.[5] In this case the Tax Court explicitly declined to attach credence to taxpayer's testimony.[6]

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[5] Indeed, the court there stated (p. 152) that "If the findings were a little different" it would have affirmed the Tax Court's decision. And in this connection it cited with approval *Nellis* v. *Commissioner,* 232 F. 2d 890, a similar case in which the Tax Court's decision was affirmed by the same court (Sixth Circuit Court of Appeals) which affirmed the Tax Court's decision in this case.

[6] Substantially the same finding was made in the *Fogel* cases. See Appendix to taxpayers' brief in the Court of Appeals, number 12,756, p. 30a.

Equally misplaced is taxpayer's reliance (Pet. 5–7) upon *Winkleer* v. *United States,* 230 F. 2d 766 (C. A. 1) and *Humphrey* v. *Commissioner,* 162 F. 2d 853 (C. A. 5), certiorari denied, 332 U. S. 817. Those cases stand for the proposition that the tax on income derived from wagering transactions is based not on the gross income, but on the net income after offsetting losses. Neither the Commissioner nor the court below here attempted to impose a tax on taxpayer's gross income. On the contrary, the Commissioner allowed a portion of taxpayer's claimed losses, and the Tax Court allowed an additional portion; the sole issue litigated below was whether the taxpayer met the burden of proving that losses over and above the amounts allowed by the Tax Court were in fact sustained.

Nor is there any conflict with *Helvering* v. *Taylor,* 293 U. S. 507, upon which taxpayer also apparently relies. (Pet. 7.) This Court there (p. 514) reaffirmed the rule that "the burden is upon the taxpayer to establish the amount of a deduction claimed." The issue of whether the findings are arbitrary depends on the facts in each case. There is no conflict.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the

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October Term, 1956

JOHN FEDERIKA, ET AL.,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING

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INDEX

	Page
Statement	1
Argument—	
"A Government of Man and Not of Laws"	3
Certificate	10

CASES CITED

Clark v. Commissioner, T.C. Memo 1955-52	4
Commissioner v. Doyle, 231 F. 2nd 635	4
Doyle, T.C. Memo 1954–234	4
Helvering v. Taylor, 293 U.S. 507	3
Lawrence, Arthur L., 27 T.C. No. 83	4
McGrath, 27 T.C. 13	4
Nemmo, 24 T.C. 67	4
Rainwater, H. G., 23 T.C. 450	4
Showell, Jack, 23 T.C. 495	2, 3, 4, 9
Stacey Mfg. Co. v. Commissioner, 237 F. (2d) 605	9
United States v. Maryland Yockey Club (210 F. 2nd 967)	3

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING

A petition for rehearing of the order denying the petition for Writ of Certiorari is hereby filed.

STATEMENT

The three taxpayers and their wives, who filed petition herein, have been unjustly treated by the Commissioner of Internal Revenue in that he set up deficiency assessments against them not based on fact, estimate, approximation, or any reasonable basis. To state the question conversely the assessment was founded upon arbitrary determination that, (1) the taxpayers should have earned 14% on the gross business handled, (2) the taxpayers should have had net gains from operation on every day they operated, (3) the same business records of taxpayers were accepted for some of the years, some of the weeks and

some of the days, but rejected for some of the years, some of the weeks or some of the days with no reasonable basis for such rejection. The Tax Court of the United States disapproved the action of the Commissioner for some of the years, some of the weeks and some of the days, and without reason approved the action of the Commissioner for some of the years, some of the weeks and some of the days. The exact same evidence and records were supplied for all of the years, weeks or days that petitioners carried on their business.

The Tax Court in the instant case relied on its previous ruling in *Jack Showell,* 23 T. C. 495.

The instant decisions were appealed to the Sixth Circuit and the *Showell* decision was appealed to the Ninth Circuit. The Ninth Circuit reversed (*238 F. 2nd 148*) and the Commissioner decided not to appeal said decision, but returned to the Tax Court for a retrial. In the present case the Court of Appeals Sixth Circuit affirmed on the decision and opinion of the Tax Court. Here the Commissioner opposed a petition for Writ of Certiorari contending that there is no conflict between said cases. All this Court need do is look at the opinion of the Tax Court in *Showell* reported as above cited and the opinion in the instant case contained in the appendix to the Court of Appeals record. It is obvious that the exact questions were considered in both cases, the exact action was taken by the Commissioner and the exact rulings were made by the Tax Court. One Court of Appeals reversed, the other affirmed. There is no distinction in fact. There is no distinguishment in law. Under such circumstances how can it be contended that conflict does not exist?

ARGUMENT

"A Government of man and not of laws"

The Commissioner's contention is founded on "burden of proof" and "finding of fact". With such contention we would have no argument. If the Commissioner made an assessment based on fact, estimate or approximation, the burden of proof would then shift to the taxpayer. If the Tax Court made a finding based on fact, the Appellate Courts should be reluctant to reverse. Here the Commissioner's assessment and the Tax Court findings were not based on fact, but merely on "guess". Under such circumstances, this Court should certainly review. If the petition herein is allowed and the Court examines the record, you will find that no claim or pretense was ever made by the Commissioner, that facts existed substantiating the assessment. You will further find as the Ninth Circuit Court of Appeals did in the *Showell* case that the Tax Court made no finding of fact. Without a finding of fact its opinion is not sustainable.

When the Tax Court renders decisions not sustained by fact and the Courts of Appeal differ, we then have a government of man and not of law. The fundamental principle applicable should be "a government of laws and not of man". This was very well applied to tax cases in *United States* v. *Maryland Yockey Club* (210 F. 2nd 967) "Federal Income Taxes are based on reality, not form, on fact, not fancy, on substance, not seeming".

This Court laid down the rule in *Helvering* v. *Taylor,* 293 U. S. 507, "the fact that the Commissioner's determination of a deficiency was arbitrarily made may reasonably be deemed sufficient to require the board to set it aside". This rule laid down by this Court has been completely ignored by the Tax Court in cases involving persons en-

gaged in the gambling business. See *H. G. Rainwater*, 23 T. C. 450; *Nemmo*, 24 T. C. 67; *Clark* v. *Commissioner*, T. C. Memo 1955-52, wherein the taxpayers' contentions were sustained as against *Showell supra*, and the instant cases where the Commissioner's contentions were sustained with the Seventh Circuit Court of Appeals in *Doyle*, T. C. Memo 1954-234 and *Showell supra Ninth Circuit* reversing the Tax Court and in the instant case the Sixth Circuit Court of Appeals affirming.

It is of greater interest to note that when *McGrath*, 27 T. C. 13, came before the Tax Court and involved exactly the same principles on which it had been reversed in *Commissioner* v. *Doyle*, 231 F. 2nd 635, the Tax Court refused to follow the Court of Appeals.

We are now faced with the situation where the Tax Court holds steadfast to the application of the rule that these cases are to be decided and distinguished on fact. Unfortunately, the assessments proposed by the Commissioner are not based on fact. There being no fact to sustain it, there are no facts on which the Tax Court can base its decisions. When the Court of Appeals in the particular circuit reverses, the Tax Court refuses to follow. When the Court of Appeals in another circuit affirms, this Court refuses to admit the case for review. Taxpayers are left in a muddle and are subjected to the individual opinions of judges rather than aware of an existing uniform rule of law.

The position of the Tax Court in refusing to follow the rulings of the Courts of Appeal is well set forth in *Arthur L. Lawrence*, 27 T. C. No. 83.

> "One of the difficult problems which confronted the Tax Court soon after it was created in 1926 as the Board of Tax Appeals was what to do when an issue came before it again after a Court of Appeals

had rersed its prior decision on that point. Clearly, it mushoroughly reconsider the problem in the light of theasoning of the reversing appellate court and, if corced thereby, the obvious procedure is to followhe higher court. But if still of the opinion that ioriginal result was right, a court of national jurisdion to avoid confusion should follow its own honesbeliefs *until the Supreme Court decides the point*.The Tax Court early concluded that it should decidell cases as it thought right.

"Thiwas not too difficult if appeal in the later case wouldot lie to the reversing Circuit. *Missouri Pacific Rilroad Co.*, 22 B. T. A. 267, 287, which followed *Weste Maryland Railway Co.*, 12 B. T. A. 889, after that ce had been reversed, 33 Fed. (2d) 695 (C. A.-4). he difficulty increased when the Tax Court adherl to its own opinion when appeal would lie to the rersing Circuit. *Southern Railway Company*, 27 B.T. A. 673, 688, affd. on the bond discount issue, 74 F(. (2d) 887 (C. A. -4); *Estate of Edward P. Hugls*, 7 T. C. 1348, 1350; *Harold Holt*, 23 T. C. 469, 78. The pressure increased in situations where morethan one Court of Appeals differed with the Tax Court, but was relieved if one or more agreed with he Tax Court. *Robert L. Smith*, 6 T. C. 255, 257. Cf. *Putnam* v. *Commissioner*, — U. S. — (12-3-56). The Court of Appeals for the Eighth Circuit in tht case affirmed a Memorandum Opinion of the Tax Court, 13 TCM 458, 224 Fed. (2d) 947. The Supme Court affirmed, after granting certiorari, becauscof alleged conflict with *Pollak* v. *Commissioner* (C. .. -3) 209 Fed. (2d) 57, reversing 20 T. C. 376; *Edwrds* v. *Allen*, (C. A. -5) 216 Fed. (2d) 794; *Cudip* v. *Commissioner* (C. A. -6) 220 Fed. (2d) 565, revering a Tax Court Memorandum Opinion, 12 TCM 1290. See also *Basalt Rock Co., Inc.*, 10 T. C. 600, reversed (C. A. -9) 180 Fed. (2d) 281, cert. denid 339 U. S. 966 and *Salko* (*Sokol*) *Brothers Furnitue Co.* v. *Commissioner*, 185 Fed. (2d) 222 (C.

A. -5), affirming a Tax Court Memorandum Opinion, 8 TCM 239 which had followed 10 T. C. 600, cert. denied 340 U. S. 952. Several Courts of Appeals have affirmed the Tax Court on the point decided in the present case.

"The Tax Court and its individual Judges have always had respect for the 11 Courts of Appeals, have had no desire to ignore or lightly regard any decisions of those Courts and have carefully considered all suggestions of those Courts. The Tax Court not infrequently has been persuaded by the reasoning of opinions of those Courts to change its views on various questions being litigated. *Cf. Estate of William E. Edmonds,* 16 T. C. 110; *Albert L. Rowan,* 22 T. C. 865; *James M. McDonald,* 23 T. C. 1091; *Mills, Incorporated,* 27 T. C. — (1-8-57).

"The Tax Court has always believed that Congress intended it to decide all cases uniformly, regardless of where, in its nationwide jurisdiction, they may arise, and that it could not perform its assigned functions properly were it to decide one case one way and another differently merely because appeals in such cases might go to different Courts of Appeals. Congress, in the case of the Tax Court, 'inverted the triangle' so that from a single national jurisdiction, the Tax Court, appeals would spread out among 11 Courts of Appeals, each for a different circuit or portion of the United States. Congress faced the problem in the beginning as to whether the Tax Court jurisdiction and approach was to be local or nation wide and made it nation wide. Congress expected the Tax Court to set precedents for the uniform application of the tax laws, in so far as it would be able to do that. Hearings before Ways & Means Committee, Revenue Act 1926, pp. 10, 869, 878, 911, 926, 932; H. Rept. No. 1, 69th Cong., 1st Sess., pp. 17-19; Congressional Record, Vol. 67, pp. 1136-7, 3749.

"The Tax Court feels that it is adequately supported in this belief not only by the creating legislation and

legislative history but by other circumstances as well. The Tax Court never knows, when it decides a case, where any subsequent appeal from that decision may go, or whether there will be an appeal. It usually, but not always, knows where the return of a taxpayer was filed and, therefore, the circuit to which an appeal could go, but the law permits the parties in all cases to appeal by mutual agreement to any Court of Appeals. Section 7482 (b) (2), I. R. C. 1954. Furthermore, it frequently happens that a decision of the Tax Court is appealable to two or even more Courts of Appeals. A few examples will illustrate. A corporation, having stockholders scattered over the United States, makes a distribution to all. The Commissioner holds it taxable as a dividend from accumulated earnings. The stockholders join in a trial before the Tax Court which decides the issue as to all petitioning stockholders, contrary to a decision of Court of Appeals A, which reversed a prior Tax Court decision, but perhaps in line with an affirming decision of Court of Appeals B. Cf. *Edwin L. Wiegand*, 14 T. C. 136 reversed (C. A. -7) 189 Fed. (2d) 167, affd. (C. A. -3) (6-26-53, unreported), later reversed (C. A. -3) 194 Fed. (2d) 479. If it had rendered a separate different decision for those stockholders in Circuit A, what amount of accumulated earnings would remain for future distributions? Another situation was presented by the *Richmond Hosiery Mills*. That corporation filed its corporate returns for three years with the collector of internal revenue for the district of Georgia and for one intermediate year with the collector of internal revenue for the district of Tennessee. It received one notice of deficiency and filed a single petition in the Tax Court each covering all four years. The Tax Court decided the case for all four years in a Memorandum Opinion and entered but one decision in the proceeding. The taxpayer took appeals to the Circuit Courts of Appeals for both the Fifth Circuit and the Sixth Circuit, in the former as to three of the years and in the latter as to a single year. The Sixth Circuit, in

*Richmod Ho*osiery Mills v. Commissioner, 237 Fed. (2d), 605, a companion case with *Stacey Mfg. Co.*, followed its own prior decision in *Owensboro Wagon Company* v. *Commissioner,* 209 Fed. (2d) 617, reversing 18 T. C. 1107, while the Fifth Circuit, which had not previously passed on this question, in *Richmond Hosiery Mills* v. *Commissioner,* 233 Fed. (2d) 908, adopted the view of the Sixth Circuit as expressed in the *Owensboro* case. Or suppose partners live in different circuits. Are the decisions of the Tax Court as to them to vary accordingly? See *Choate* v. *Commissioner,* 324 U. S. 1, in which the appeal in the case of *Hogan* was taken to the Fifth Circuit which affirmed the Tax Court (1 TCM 208), *Hogan* v. *Commissioner,* 141 Fed. (2d) 92, and the appeal in the case of *Choate* was to the Tenth Circuit which reversed the Tax Court, *Choate* v. *Commissioner,* 141 Fed. (2d) 641, which was then reversed by the Supreme Court, thus affirming the Tax Court (1 TCM 208). Many more similar examples could be given. There is also the sometimes difficult problem of knowing from prior decisions of the appellate court precisely what its attitude is in relation to the current question before the Tax Court. Cf. *Estate of Catherine Cox Blackburn,* 11 T. C. 623, modified 180 Fed. (2d) 952, particularly where it has more than one decision outstanding and each may seem to have a bearing but they are not too easily reconciled. The *Slaff* case already discussed is another example.

"*The Commissioner of Internal Revenue, who has the duty of administering the taxing statutes of the United States throughout the Nation, is required to apply these statutes uniformly, as he construes them.* The *Tax Court,* being a tribunal with national jurisdiction over litigation involving the interpretation of Federal taxing statutes which may come to it from all parts of the country, *has a similar obligation to apply with uniformity its interpretation of those statutes.* That is the way it has always seen its statutory duty and, with all due respect to the Courts of Appeals, *it can*

not conscientiously change unless Congress or the Supreme Court so directs."

The Court of Appeals (in the *Stacey Manufacturing Company* v. *Commissioner,* 237 F. (2d) 605) took another view of the situation:

> "The situation developed in these cases requires the expression of our considered opinion that the Tax Court of the United States is not lawfully privileged to disregard and refuse to follow, as the settled law of the circuit, an opinion of the court of appeals for that circuit. If the tax court is not bound on questions of law by decisions of the appropriate circuit having jurisdiction, why should any jurisdiction be vested in circuit courts of appeals to review decisions of the tax court? The district courts of the several circuits also have statutory jurisdiction in tax cases and they are bound to follow the rules of decision pronounced by the United States Court of Appeals having appellate jurisdiction over the particular district court. The tax court is no less bound to do so. The mere fact that it is a court having jurisdiction in tax cases throughout the United States does not establish the tax court as superior in any aspect to United States District Courts."

What is the solution to this dilemma? Is it the Commissioner's attitude in this case where he accepts the reversal in the *Showell* case and goes back for a new trial and opposes a petition for certiorari in the instant case and seeks to stand on the rule or ruling of the Court of Appeals? Is this conducive to uniform application of tax laws to all taxpayers in all parts of the country?

What is the duty and obligation of the Supreme Court of the United States? Is it merely to consider that its burden of business is too heavy at this time to let in too many cases and thus let injustice continue until such time when its docket is clear and it can examine the question? Are taxpayers to be sentenced to a life term of slavery in having

their lives' accumulations and future earnings subjected to confiscation under governmental tax laws based on "guess" and not on fact. Is this even-handed justice?

A proper respect for the decisions of the highest Court in our land requires us to make this additional effort and appeal to the Court, not to permit the Commissioner of Internal Revenue to blow hot and cold and to play fast and loose with the taxpayers. The fact that the petitioners occupation is that of *"gambler"* does not justify the denial of justice. No such severe penalty is imposed by the law on persons who gain their livelihood from that business.

May we respectfully direct the Court's attention to the quotation from *Gothe*:

> "In the government of men, a great deal may be done by severity, more by love, but most of all by clear discernment and impartial justice which pays no respect to persons."

We respectfully urge the Court to consider this petition for rehearing and to grant petitioners' request for Writ of Certiorari so that the law may again be established and the Commissioner compelled to treat with even-handed justice all taxpayers whether "gamblers" or otherwise occupied.

Respectfully submitted,

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CERTIFICATE

The undersigned counsel for petitioners hereby certify that this petition for rehearing is presented in good faith and not for delay.

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